

**Shaw's Supermarkets, Inc. and United Food and Commercial Workers International Union, Local 1445, AFL-CIO.** Cases 1-CA-39764, 1-CA-39971, 1-CA-39972, and 1-CA-40139

August 10, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN  
AND SCHAUMBER

Upon a series of charges and amended charges filed beginning on March 1, 2002, by the United Food and Commercial Workers International Union, Local 1445, AFL-CIO (the Union), the General Counsel of the National Labor Relations Board issued a consolidated complaint on December 23, 2002, alleging, inter alia, that the Respondent, Shaw's Supermarkets, Inc., violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union after the third year of a 5-year contract. The Respondent filed a timely answer admitting in part and denying in part the allegations of the complaint.

On February 13, 2003, the General Counsel filed a motion to transfer the proceeding to the Board and for partial summary judgment. The General Counsel seeks to sever and remand for a hearing all of the complaint allegations except for the allegation that the Respondent unlawfully withdrew recognition, on which the General Counsel seeks summary judgment. On February 15, 2003, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause. On March 6, 2003, the Respondent filed an opposition to the General Counsel's motion and a cross-motion for partial summary judgment concerning the withdrawal of recognition. On March 11, 2003, the Union filed a brief in support of the General Counsel's motion. On March 17, 2003, the Respondent filed a reply to the Union's brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record and briefs, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation with an office and place of business in East Bridgewater, Massachusetts, is engaged in the retail grocery business at various locations throughout Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont. The Respondent annually, in the course and conduct of its operations, derives gross revenues in excess of \$500,000. The Respondent annually, in the course and conduct of its operations, purchases and receives at its various Massachusetts facilities

goods valued in excess of \$50,000 directly from points outside the Commonwealth of Massachusetts.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

The Respondent and the Union had a 5-year contract covering about 1600 full-time and regular part-time employees at 12 of the Respondent's stores in the Worcester County area of central Massachusetts. The agreement was effective from January 31, 1999, to January 31, 2004.

On February 2, 2002, a bargaining unit employee filed a decertification petition with the Board. The petition was supported by slips signed by bargaining unit employees stating, "I do not want UFCW Local 1445 to continue to represent me as my collective bargaining agent with my employer, 'Shaw's Supermarkets, Inc.'" After filing the petition, the employee who filed it continued to collect additional signatures. On February 11 and 20, 2002, the employee provided those signed slips and photocopies of those previously submitted to the Board to the Respondent. The Respondent received more signed slips on February 26. An accounting firm hired by the Respondent counted the slips and, on about February 27, submitted a report to the Respondent stating that more than 900 signatures matched names on the list of bargaining unit employees provided by the Respondent. Based on this tabulation, the Respondent withdrew recognition on February 28, 2002. The General Counsel does not contend that the petition was tainted by any unfair labor practices.

B. Contentions of the Parties

The General Counsel contends that an employer should not be allowed to withdraw recognition during the term of a contract. The General Counsel notes that in *General Cable Corp.*, 139 NLRB 1123 (1962), the Board held that a union's majority status cannot be questioned during the term of a 3-year contract. Citing *Montgomery Ward & Co.*, 137 NLRB 346 (1962), and *Northern Pacific Sealcoating*, 309 NLRB 759 (1992), the General Counsel further notes that when a contract is for a term longer than 3 years, it bars for its full term election petition filed by the employer or by an incumbent union (though not one filed by an employee or another union).

The General Counsel cites the Board's explanation in *Montgomery Ward* that the contract-bar doctrine seeks to afford the contracting parties and employees a reasonable period of stability while also affording employees the

opportunity at reasonable times to change their bargaining representative or cease being represented altogether. The General Counsel emphasizes the statement in *Montgomery Ward* that the only reason for the possible disruption of a contractual relationship is the effectuation of employees' right to free choice. While acknowledging that *Montgomery Ward* allows a petition by employees or a rival union after the third year of a contract of longer duration, the General Counsel highlights the Board's statement in that case that it could not permit employers or incumbent unions to take advantage of whatever benefits may accrue from the contract with the knowledge that they could avoid their contractual obligations by petitioning for an election.

The General Counsel contends that a contract of more than 3 years' duration should continue to act as a bar for its entire term with respect to a withdrawal of recognition. The General Counsel maintains that it would be unreasonable to allow an employer to withdraw recognition at a time when it would not be allowed to take the less disruptive step of filing an RM petition. As to effectuating employees' right to free choice, the General Counsel submits that the appropriate method is to hold an election after employees file a timely decertification petition, as indeed employees did here.

The General Counsel urges the Board to reject any argument that *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001), stands for the proposition that an employer is free to file an RM petition or to withdraw recognition after the third year of a contract for a longer period. In *Levitz*, the Board cited *Auciello Iron Works v. NLRB*, 517 U.S. 781, 786 (1996), for the proposition that a union's majority status cannot be questioned during the life of a collective-bargaining agreement, up to 3 years. The General Counsel argues that, in doing so, the Board was merely reiterating the general contract-bar rule and did not address the issue presented here.<sup>1</sup>

The Respondent contends that it met the *Levitz* criterion in that it had actual proof of loss of majority support to support its withdrawal of recognition. The Respondent notes that the Board in *Levitz* rejected the argument that an employer should never be permitted to withdraw recognition except after a Board-conducted election. The

Respondent points out that in footnote 70 of *Levitz*, supra at 730, the Board stated: "An employer may not lawfully withdraw recognition while a collective-bargaining agreement is in effect, because an incumbent union enjoys a conclusive presumption of majority status during the life of the contract (up to 3 years)." The Respondent maintains that, should the Board adopt a rule that an employer cannot withdraw recognition before expiration of a contract of more than 3 years' duration even where there is actual proof that the union has lost majority status, such a rule should be applied only prospectively.

The Respondent notes the statement in *Levitz* that if a union actually has lost majority support, the employer must cease recognizing it, both to give effect to employees' free choice and to avoid violating Section 8(a)(2) of the Act by recognizing a minority union. The Respondent states that the General Counsel does not dispute the fact that the Union lost its majority status, or the fact that the Respondent withdrew recognition only after being presented with actual proof of the loss. The Respondent submits that the interests of an employer and a union in negotiating a contract of more than 3 years' duration do not trump the employees' Section 7 right to self-determination.

The Respondent argues that *Levitz* "decoupled" the standard for withdrawal of recognition from the standard used to grant or deny an RM petition, that *Montgomery Ward* is distinguishable, and that employees are not limited to Board-conducted elections as the sole means of exercising their Section 7 right to self-determination.

The Union, the Charging Party here, contends that *Montgomery Ward* and its progeny render unlawful the Respondent's withdrawal of recognition. The Union states that if the Respondent had awaited the outcome of the decertification petition, the issue would have been resolved long ago. The Union also relies on *W. A. Krueger Co.*, 299 NLRB 914 (1990), where the Board held that any unilateral changes made before the certification of results in a decertification election violate Section 8(a)(5), and that a union ostensibly losing a decertification election remains the established bargaining representative until the certification of results issues. Based on *Krueger*, the Union maintains that the filing of a decertification petition does not give an employer carte blanche to withdraw recognition. The Union submits that the Respondent has misconstrued *Levitz*. As to the Respondent's reliance on footnote 70, the Union argues that the footnote, read as a whole, merely recites the contract-bar rules set forth in *General Cable*, supra. The Union further contends that *Levitz* created a "safe harbor" for employers to avoid violating Section 8(a)(2) during the pendency of a decertification petition, i.e.,

<sup>1</sup>*Levitz* held that an employer may unilaterally withdraw recognition from an incumbent union only where the union has actually lost the support of a majority of the bargaining unit. The Board overruled *Celanese Corp.*, 95 NLRB 664 (1951), and its progeny insofar as they permitted withdrawal on the basis of good-faith doubt. As the law now stands, an employer may defeat a post-withdrawal refusal-to-bargain allegation if it shows, as a defense, the union's actual loss of majority support. An employer may obtain an RM election by demonstrating a good-faith reasonable uncertainty as to the incumbent union's continuing majority status.

with evidence of actual loss of majority status, the employer can file an RM petition. Thus, the Union maintains, *Levitz* counsels employers not to take the type of unilateral action taken here by the Respondent. Finally, the Union submits that if the Board decides to overrule *Montgomery Ward*, its decision should have prospective application only.

### C. Discussion

For the reasons stated below, we grant the Respondent's cross-motion for partial summary judgment, and we dismiss the allegation that the Respondent unlawfully withdrew recognition from the Union. We grant the General Counsel's motion only insofar as it seeks to sever and remand the remaining allegations.

The precise issue presented here, which seems to be an issue of first impression, is whether an employer may rely on evidence of actual loss of majority support to withdraw recognition from a union after the third year of a contract of longer duration. For the following reasons, we find that it may do so.

In *Levitz*,<sup>2</sup> supra, the Board rejected the view that an employer should only be allowed to withdraw recognition following a Board-conducted election, *Levitz* makes clear however, that the unilateral withdrawal of recognition from an incumbent union is unlawful unless that union has actually lost the support of a majority of the bargaining unit employees. The Respondent's evidence satisfies that condition here. As explained above, before it withdrew recognition from the Union, the Respondent was in possession of verified information indicating actual loss of majority support. Further, there is no contention that the loss of majority in this case was tainted by any unfair labor practices, nor is there any contention that the Respondent incited the petition or otherwise contributed to employee disaffection from the Union. Thus, the bona fides of the Respondent's evidence of the Union's loss of majority support is unchallenged.

Further, although *Levitz* involved withdrawal of recognition after contract expiration, the Board's distinction in that case between the showing required for a withdrawal of recognition and that required to obtain an RM election has, in our view, broader and more general significance. Simply put, an employer, as here, in possession of facts showing an actual loss of majority support for an incumbent union should have wider freedom of action than an employer lacking such knowledge.

The task in this case is to determine what the parameters of this wider freedom of action should be. Ideally,

<sup>2</sup> In applying *Levitz* to the instant facts, Chairman Battista and Member Schaumber express no view as to whether that case was correctly decided.

we should fix these parameters at a point where the policy goals of stability in labor relations and employee freedom of choice—which are sometimes competing objectives—can best be satisfied and reconciled. In the present case, we believe that both of these policy goals can be effectively accommodated by permitting the Respondent, which was in possession of untainted evidence of the Union's actual loss of majority support, to withdraw recognition from the Union after the third year of a contract of longer duration (in this case, a 5-year contract).

We reach this conclusion for the following reasons. First, we agree with the Board's statement in *General Cable Corp.*, supra, that if the contract bar period were expanded beyond 3 years, "stability of industrial relations would . . . be so heavily weighted against employee freedom of choice as to create an inequitable imbalance." Id. at 1125.

Second, where, as here, the Respondent withdrew recognition after the third year of the contract and only after receiving uncontested evidence of actual loss of majority support, the interest of preserving stability in bargaining relationships is necessarily tempered. The bargaining relationship has, in fact, matured, and the employees have had the benefit of 3 years of undisturbed experience with the Union as their representative. Notwithstanding—or perhaps because of—that experience, an uncoerced majority has now rejected continued representation. Because a union's role in the relationship established by a collective-bargaining agreement depends on the union's maintaining the support of a majority of the unit employees, evidence of an actual loss of that support reflects destabilization in the bargaining relationship and undercuts the theoretical assumption that a collective-bargaining agreement evidences stability in labor relations for the duration of the contract.<sup>3</sup>

Third, the evidence of actual loss of majority support also reflects that a majority of the unit employees have reconsidered the desirability of continued union representation and have decided against it. They reached this decision not while the union was still negotiating for a first contract or even during the first 3 years of the contract. Rather, they did so only after 3 years of experience under that contract, and in a context free of coercion or employer instigation. Thus, the protection of employees'

<sup>3</sup> As the Supreme Court explained in *Auciello Iron Works v. NLRB*, 517 U.S. at 786 (footnote omitted), "[a] union is . . . entitled under Board precedent to a conclusive presumption of majority status during the term of any collective-bargaining agreement, up to three years. . . . [This presumption is] based not so much on an absolute certainty that the union's majority status will not erode," *Fall River Dyeing*, 482 U.S. 27, 38 (1987), as on the need to achieve "stability in collective-bargaining relationships." Id. (internal quotation marks omitted)."

statutory right to choose whether or not to be represented is clearly a compelling interest in this case.

Given these considerations, we find that the parameters for an employer's wider freedom of action must be set to permit an employer, relying on untainted evidence of a union's actual loss of majority support, to withdraw recognition from the union after the third year of a contract of longer duration. The context of the present case makes clear that these parameters are appropriate: the goal of stability of labor relations having been satisfied, and evidence of the Union's actual loss of majority support having been presented, the goal of employee freedom of choice must be vindicated. Permitting the Respondent to withdraw recognition from the Union furthers this goal.<sup>4</sup>

It is true, as the General Counsel and the Charging Party emphasize, that an employer cannot file a petition while a contract to which it is a party is in effect. However, such a petition would be based simply on an uncertainty as to the union's majority status. The instant case involves the fact that the Union has lost majority status.

While it is true that the Respondent could have awaited the outcome of the decertification election, the ready availability of blocking charges—which, indeed, were filed here—and the delay attendant upon their resolution render this course of action problematic where a union has actually lost majority support. Continuing to recognize and deal with such a union is as deleterious to employee rights as failing to recognize a union that enjoys majority support.

Our dissenting colleague says that the “blocking charge rule” was reaffirmed in *Levitz*. However, we note that the *Levitz* decision had two parts. In the first part, the Board held that a withdrawal of recognition was privileged where there is a loss of majority support for the union. The second part held that where there is only an uncertainty as to majority status, the RM petition is the route to be followed. The discussion of the blocking charge rule concerns the second part of *Levitz*. The instant case involves the first part of *Levitz*. Our point is simply that where, as here and in the first part of *Levitz*, there is a loss of majority, there is no need to use election processes procedures which can be delayed by blocking charges.

*Montgomery Ward*, supra, does not require a different result. That case prohibits the filing of a petition during the term of a contract by the employer or the incumbent union, which has not occurred here. The action taken

here was premised on the fact of loss of majority. In light of the loss of majority, and the delays that can attend the processing of a petition, we would permit the withdrawal of recognition, so that the employees will not be forced to endure, for the rest of the agreement, representation they no longer desire.

Notwithstanding the compelling Section 7 interests at stake, our dissenting colleague, relying on *Hexton Furniture Co.*, 111 NLRB 342 (1955), contends that it would be anomalous to hold that an employer may withdraw recognition at a time when it would not be permitted to petition for an election. *Hexton*, however, is inapposite. There, the union and the respondent, on November 24, 1952, signed a collective-bargaining agreement effective to December 15, 1954, and from year to year thereafter in the absence of notice to terminate by either party. The respondent withdrew recognition from the union on December 4, 1953, less than 13 months after entering into the contract. Thus, in *Hexton*, the withdrawal of recognition occurred at a time when, under contract bar rules, a question concerning representation could not be raised—i.e., the union's status could not be challenged. By contrast, in the instant case, the withdrawal of recognition occurred after the third year of a contract of longer duration, a point in time at which we find, for the reasons set out above, that a question concerning representation may be raised. Further, in *Hexton* the Board found the withdrawal unlawful in part because it agreed with the trial examiner that, if the union had lost its majority by December 4, 1953, that loss was attributable to the respondent's unfair labor practices in soliciting and aiding employees to withdraw from the union. In the instant case, there is no contention that the loss of majority relied on by the Respondent was tainted by unfair labor practices. In light of the significant differences between *Hexton* and the instant case, we disagree with our colleague's view that *Hexton* clearly stands for the principle that when an employer is proscribed from filing an election petition, it is also prohibited from withdrawing recognition.

Our dissenting colleague also claims that we are permitting the employer to disregard its own contract. However, this is not a case where an employer simply decides, without justification, to ignore the contract. Rather, this is a case where the employer is responding to an unsolicited and uncoerced expression of a loss of majority support for the union as a bargaining representative. Our dissenting colleague states that we do not seem to believe that a Board election, based on the employee-filed petition, will vindicate employee freedom of choice. This is untrue. Rather, our concern is that, in the time it takes to ultimately resolve the representation case, employees will be forced to endure representation that they

<sup>4</sup> We recognize that a decertification petition was filed here. However, as *Levitz* makes clear, an employer who can show that the union has lost its majority status need not wait for an election to further confirm that fact.

have unquestionably rejected.<sup>5</sup> This would be so even though those employees have had the benefit of 3 years of experience with the Union before coming to the conclusion that continued representation is undesirable.

In regard to the time that it can take to resolve a decertification election case, we note that, in many cases, blocking charges are filed and delay the election until the charges are resolved one way or another. And, even absent such charges, a union election loss can be contested by challenges and/or objections. Thus, we see no basis for our colleague's apparent view that the representation case would have been resolved promptly if only the Respondent had not withdrawn recognition.

For the foregoing reasons, we find that, in the circumstances of this case, the Respondent's withdrawal of recognition was lawful.

#### ORDER

The allegation that the Respondent unlawfully withdrew recognition from the Union is dismissed. The remaining allegations are remanded to the Regional Director for appropriate action.

MEMBER LIEBMAN, dissenting.

For more than 40 years, the Board has maintained a clear rule that a party to a collective-bargaining agreement may not repudiate its own contract or, in most instances, petition the Board for an election during the life of that contract. When a contract is of longer than 3 years duration, however, the Board holds that a *nonparty* to that contract (either an employee or a rival union) may, with a sufficient showing of employee support, file a petition and obtain an election to settle a question concerning representation. This balance of statutorily-recognized interests serves to protect the right of employees to self-determination and to promote the interests of labor stability. The majority today permits an employer to disregard its agreement and unilaterally withdraw recognition from the union during the agreement's term. It does so even though a valid employee-filed petition for an election was pending. Because the majority today arbitrarily departs from longstanding precedent and procedure—and reaches a result that serves neither of the Act's goals—I dissent.

#### I.

The Respondent and the Union were parties to a 5-year contract effective from January 31, 1999, to January 31, 2004. On February 2, 2002, a bargaining unit employee filed a decertification petition with the Board. On Febru-

ary 28, 2002, while this petition was being processed in the Board's Regional Office, the Respondent unilaterally withdrew recognition of the Union. The withdrawal of recognition, of course, occurred during the term of the contract.

It is well settled that a contract of longer than 3 years duration does not bar the processing of a petition by a nonparty to that agreement. *General Cable Corp.*, 139 NLRB 1123 (1962); *Montgomery Ward & Co.*, 137 NLRB 346 (1962). See also *Absorbent Cotton Co.*, 137 NLRB 908 (1962). Here, the employee-filed petition was entirely appropriate under our precedent and the Union's continued majority status validly could be tested pursuant to the Board's election processes. This is what should have happened here. Instead, an election was not conducted in this case because the Respondent's unilateral withdrawal of recognition undermined the election process and the petition was blocked.

In *Montgomery Ward & Co.*, supra, the Board addressed the question of how to properly balance the policy interest in promoting employee freedom of choice with the interest in preserving the stability of contractual relationships. There, as here, an employer and a union were parties to a 5-year bargaining agreement. During the term of that agreement, the employer filed an election petition. Balancing the dual interests of employee freedom of choice and contract stability, the Board found that it would entertain timely petitions filed by employees or by rival unions, but would *not* process petitions filed by either of the contracting parties, during the *entire term* of their contract, except where an uncertified union sought to obtain the benefits of certification through the election process.

The Board's rationale in *Montgomery Ward* is not limited to disallowing the processing of petitions filed by contractually-bound employers for the entire duration of a bargaining agreement. It applies to unilateral self-help too. Thus, the *Montgomery Ward* Board expressly found that the principle of that case—preserving the stability of contracts while ensuring employees' freedom of choice—encompassed both the election process *and* conduct by a contractual party seeking to disregard the agreement. Addressing the freedom of choice interests validated through the election process, the Board stated:

The sole reason for the possible disruption of a contractual relationship is to give effect to the employees' right to freedom of choice. There is no other valid rationale for the Board's conducting an election in disregard of the agreement of the parties as to the term thereof *or for the Board to permit the parties to disregard their own agreement, absent mutual consent*, as where the contract is not asserted as a bar.

<sup>5</sup> That is, under *W. A. Krueger*, 325 NLRB 1225 (1990), the union remains the representative until the election results are certified.

137 NLRB at 348 (emphasis added).

If a party to a contract may not even file an election petition with the Board during the entire contract term, it is not surprising that self-help is also prohibited. This common sense rule has been the law for decades. As the Board stated in *Hexton Furniture Co.*, 111 NLRB 342, 344 (1955):

Otherwise, we should have the anomalous result of an employer being permitted unilaterally to redetermine his employees' bargaining representative at a time when the Board would refuse to make such redetermination because the time is inappropriate for such action. Accordingly, by withdrawing recognition from the Union during the middle of the contract term, the Respondent unlawfully refused to bargain with the Union.

*Montgomery Ward* simply follows the principle of *Hexton Furniture*. It permits nonparties to the contract to file an election petition and thereby appropriately raise a question concerning representation, but bars an election based on a petition filed by a contracting party. And, as *Hexton Furniture* makes clear: if the employer's petition is impermissible, then there can be no unilateral withdrawal of recognition either.<sup>1</sup>

## II.

Holding a party to its contractual agreement is a cornerstone of our Act. Indeed, Section 8 (d), which defines the parties' bargaining obligations, restricts the unilateral abandonment of a bargaining agreement during its term, as occurred here. Section 8 (d) states that:

[W]here there is in effect a collective-bargaining contract covering employees . . . the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification . . . continues in full force and effect . . . all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration of such contract, whichever occurs later.

These restrictions become inapplicable under Section 8 (d) "upon an intervening certification of the Board" pursuant to Section 9 (a) of the Act "under which the labor organization . . . which is a party to the contract, has . . . ceased to be the representative of the employees." Thus, *Montgomery Ward* is part and parcel of this statutory scheme: it provides for an

<sup>1</sup> The majority characterizes *Hexton Furniture* as "inapposite." But that decision clearly stands for the principle that when an employer may not file an election petition, it also is prohibited from unilaterally withdrawing recognition. And *Montgomery Ward* makes clear that the employer here was not permitted to petition for an election, a point the majority concedes.

election process where nonparties to the contract may question the union's continued majority status, while the integrity of the contract is preserved unless and until the Board certifies a contrary result pursuant to a valid election.

Even during the decertification election process itself labor stability remains fundamental. Thus, when there is an incumbent bargaining representative and a decertification election is directed, the Board does not permit unilateral self-help upon the tally of ballots, but only after issuance of the certification of results. See *W. A. Krueger*, 325 NLRB 1225 (1990). This principle serves to preserve the status quo until it is clear that the interests of self-determination prevail. By permitting the undermining of the election process here, the majority's validation of the Respondent's self-help unilateral action erodes the principles of *W.A. Krueger*.

## III.

The majority suggests that the Respondent's self-help during the contract term is supported by our decision in *Levitz Furniture of the Pacific*, 333 NLRB 717 (2001). That case does not support the notion that an employer may unilaterally withdraw recognition when it may not even file an election petition. Indeed, *Levitz* stands for precisely the opposite notion. In *Levitz*, the Board applied a *stricter* standard before permitting unilateral action—and a *less* stringent standard for the filing of a petition (actual loss of majority status for withdrawal, but only a good faith reasonable uncertainty for a petition). In this case, the majority acknowledges that the employer could not file its own petition, but, based on the same sequence of events, permits self-help. This is directly contrary to the principles of *Levitz*.

Further, to the extent that the majority finds in *Levitz* support for a 3-year maximum period under Section 8 (a) (5), it is mistaken. Footnote 70 of *Levitz* states that "(a)n employer may not lawfully withdraw recognition while a collective-bargaining agreement is in effect, because an incumbent union enjoys a conclusive presumption of majority status during the life of the contract (up to 3 years)." Footnote 70 of *Levitz* arises in the context of the Board's discussion there of the employer's announcement of a withdrawal of recognition *at the end of the contract*. The reference to a contract "up to 3 years" pertains to the general contract-bar period. *General Cable*, supra. And, typically, the contract bar period is co-extensive with the period in which there is a conclusive presumption of majority status. *Hexton Furniture Co.*, supra. But, as to the Respondent here, a party to a 5-year contract, the prohibition against the filing of an election petition covers the entire duration of the bargaining agreement, not just for 3 years. *Montgomery Ward*, supra. Indeed, the majority acknowledges this principle.

The reference to 3 years in *Levitz*, therefore, does not apply to the Respondent because its contract-bar period is 5 years (under *Montgomery Ward*). And, because the period for a withdrawal of recognition is co-extensive with the contract-bar period applicable to the Respondent (under *Hexton*), that period is also 5 years. Accordingly, it follows that, under all of the precedent discussed, including *Levitz*, the Respondent's unilateral mid-term withdrawal from a binding contract is unlawful under Section 8 (a) (5) and (1).

#### IV.

The majority claims that the Respondent's unilateral self-help here, in contrast to a Board election, better balances the interest of contract stability and the interest of employee self-determination. According to the majority, "the goal of employee freedom of choice must be vindicated." Ironically, the majority does not seem to believe that a Board election, based on an employee-filed petition, will vindicate employee freedom of choice.

The majority says that an election is insufficient because a blocking charge can delay the validation of employees' freedom of choice. But it is the Respondent's unilateral action here—an alleged unfair labor practice frustrating a fair and free election—that blocked the election. It is circular to argue, as the majority does, that the Respondent's self-help must be permitted *because* that action has delayed an election.

The majority concludes that permitting a withdrawal of recognition is necessary "so that employees will not be forced to endure, for the rest of the agreement, representation they no longer desire." Of course, an election would have been conducted immediately but for the Respondent's unilateral action. And, if employees decided to reject representation, the agreement would be nullified. The majority, however, insists that evidence of loss of majority support justifies a resort to self-help, because the Board may take too long to conclude an election, given the possibility of blocking charges (which delay the conduct of an election) and objections to election conduct (which delay certification of the outcome). Self-help may well be more efficient than following safeguards designed to protect employee free choice, but there is no support in our case law for the majority's rationale—just the opposite.<sup>2</sup>

<sup>2</sup> See *Levitz*, supra, 333 NLRB at 728 fn. 57 (reaffirming Board's "blocking charge" rule).

As to the interest of contract stability, the majority claims that interest is validated because the parties (and employees) already have lived under their contract for 3 years. But the parties' bargain is for 5 years. The Board did not impose a 5-year agreement. The parties struck that bargain. And, as discussed, our longstanding precedent mandates that parties to an agreement cannot ordinarily walk away from their agreement during its term. It is mystifying how permitting a party to walk away from a contract preserves, in any recognizable form, the interests of contract stability. Indeed, the majority affirms precedent, *Montgomery Ward*, which dictates that the interest of contract stability is so strong that the Respondent cannot even file a petition—only nonparties can do that.

It is far more sensible to proceed with the election to validate the interest of employees' freedom of choice while, at the same time, holding the contractual parties to their bargain—unless and until the election tells us contractual stability must give way to the competing interest. Here, while purportedly striking an appropriate balance of interests, the majority scuttles both the election process *and* the contract. It is a peculiar form of balancing when neither interest is accommodated fairly.

#### V.

Approving the restriction of an employer's freedom to withdraw recognition from a union after entering into a collective-bargaining agreement, the Supreme Court has observed that "[t]here is nothing unreasonable in giving a short leash to the employer as vindicator of its employees' organizational freedom."<sup>3</sup> Here, in contrast, the majority gives the employer a remarkably *long* leash—permitting the employer to act unilaterally not merely during the term of a collective-bargaining agreement, but also where employees have filed an election petition with the Board. Indeed, an employer now may engage in self-help in circumstances where it is not permitted to seek a Board election. Because that anomalous result places employers' freedom of action above both of the Act's carefully-balanced goals, today's decision is neither rational nor consistent with the Act. I dissent.

<sup>3</sup> *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 790 (1996) (upholding Board rule that employer's preexisting basis for withdrawing recognition from union cannot privilege withdrawal after collective-bargaining agreement is accepted).